DECISION THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548 26398

FILE: B-210941 **DATE:** September 30, 1983

MATTER OF: Univox California, Inc.

DIGEST:

1. Protest is timely notwithstanding agency's contention that protest as originally filed was too indefinite and that protest as later defined is untimely. Protester was clearly objecting to grounds stated in agency's letter rejecting its proposal.

2. Contention that protest should be dismissed under section 21.3(d) of Bid Protest Procedures because comments on agency's report were not filed within 10 working days of its receipt is rejected where protester timely requested and was given additional time to respond.

3. No rational basis has been established for rejection of proposal to design and fabricate three reverse osmosis water purification units. Although agency believed units would not work without major redesign, it has not demonstrated that reliance on data agency used in its analysis was reasonable.

Univox California, Inc. protests the rejection of its proposal under request for proposals (RFP) DAAK70-82-R-1233 issued by the Army Mobility Equipment Research and Development Command. The procurement is to fund (on a fixed price incentive, firm target basis) a 22-month effort to design, fabricate, test and deliver three reverse osmosis water purification units. We sustain the protest.

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A. Background:

According to the RFP, the water purification unit is to be a containerized, easily transportable system for use by the Army under a broad range of conditions, including those which may be encountered in desert warfare. It is to utilize reverse osmosis, which is the process of separating water from its impurities by forcing the water under pressure through a semi-permeable membrane, which is referred to as a reverse osmosis, or RO, element.[1] The units required are to be capable of producing 3,000 gallons of potable water per hour when operating with 77°F fresh or brackish water and 2,000 gallons per hour (gph) when operating with 77°F sea water. The only reverse osmosis water purification unit in current production for field use by the Army is a 600 gph unit that Univox manufactures.

As stated in the RFP, proposals were to be evaluated by considering technical approach (50 percent), cost (33 percent), and management considerations (17 percent). Technical approach embraced nine identified subcriteria, including system design methodology which, along with reliability, fabrication procedures and knowledge of integrated logistics support, were to receive somewhat more weight than the other technical subcriteria. The other subcriteria included operability and maintainability, producibility engineering, scheduling realism, test procedures

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[1]For purposes of our decision, a reverse osmosis water purification system of the type required consists of: (1) feed water pumps used to pump raw (untreated) water to the water purification unit through connecting hoses, (2) a clarification and chemical treatment system which removes relatively large impurities and chemically treats the water to achieve a water quality (effluent) acceptable to the reverse osmosis elements, (3) a high pressure pump to achieve the pressure needed to support reverse osmosis, (4) the RO elements themselves, (5) a further chemical treatment system (if needed to achieve the quality of potable water specified), (6) holding tanks to store the water produced, and (7) one or more sources of power, generators and other miscellaneous support equipment, including instrumentation.

and material deterioration prevention and control. Management subcriteria included corporate experience, personnel experience, facilities and equipment, contractor's internal control and past performance.

Univox's proposal received scores for system design. methodology and scheduling realism that were significantly out-of-line with the scores assigned for these criteria to proposals the Army deemed to be acceptable. Univox's proposal received scores for the five management subfactors that were somewhat below average (when compared to the acceptable proposals), and that were out-of-line with respect to contractor's internal control.[2]

The record further discloses that the evaluators recommended (and the contracting officer concluded) that Univox's proposal should be eliminated from further consideration for essentially two reasons: they did not believe the Univox design would work, and they did not believe that Univox (which is a relatively small firm teamed with several other firms) would be capable of performing the contract.

Concerning the adequacy of Univox's proposed design concept, the contracting officer, in a letter advising Univox of its rejection, identified three deficiencies as most significant. The letter states that:

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[2]Univox's proposal in the cost area was also out-of-line as scored by the Army. We have not taken cost into consideration in reaching our decision, however, because the Army's decision to reject Univox's proposal was not based on cost; because the methods used to evaluate cost and cost realism have not been fully explained in the Army's reports to our Office; and because to the extent the methodology used to score cost and cost realism is apparent, the scores assigned seem to depend upon identification of acceptable proposals and would have differed had Univox's proposal been considered acceptable.

"a. The [proposed water] feed flow rate is inadequate to meet the performance specification for the Reverse Osmosis (RO) elements selected in the array proposed . . . .

"b. The proposed [RO] element operating pressure . . . significantly exceeds the recommended design pressure . . . and will lead to a premature degradation of the elements . . . .

"c. The proposed . . . engine . . . would be required to be run at [high] RPM to obtain the [required] horsepower. The manufacturer's recommended RPM for this engine is [lower than the RPM required]. The additional speed required of this engine would have an unacceptable effect on its reliability and maintainablity (RAM). Furthermore, the [proposed] engine will not furnish adequate horsepower . . . at the elevated ambient temperature specified in the purchase description . . . ."

The record shows that the evaluators also questioned Univox's choice of a chlorinator, and concluded that the motors selected would require modification of standard military generator sets (which was forbidden by the RFP); that the Univox unit would experience noise and cooling problems; and that Univox had failed to provide for manual override of the backwash (self-cleaning) cycle as required. They concluded that the layout of the unit was too crowded to meet RFP operability and maintainability requirements.

Moreover, the evaluators expressed various concerns with respect to Univox's capabilities. While the evaluators recognized that much of the design effort was to be subcontracted, they concluded that all of the prior work Univox or its design subcontractor had done in the field concerned equipment for which a military design was specified. The evaluators conceded that Univox and its principal design subcontractor have adequate facilities and

equipment but questioned whether Univox's existing contracts to fabricate 600 gph units would interfere. Pointing out that Univox (located on the West Coast) and its principal design subcontractor (which is an East Coast firm) are geographically separated, the evaluators questioned whether technology transfer between them would be feasible, and how Univox would manage the contract. Finally, the evaluators concluded that Univox's and its principal design contractor's prior contracts with the Army were not performed satisfactorily because cost objectives and performance goals established in the contracts were not met.

According to Univox, the evaluators' conclusions are totally unfounded. Labeling their belief that its design would not work as "no more substantive than broth boiled from the bones of a dead pigeon," Univox charges that the Army: (1) downgraded its proposal for failing to provide a level of detail that the RFP did not require, (2) ignored data contained in the proposal, (3) misread both the proposal and Army test reports, (4) relied on unverified and erroneous data obtained from sources other than the procurement record, and (5) ignored data contained in the Army's own files when it would have benefited Univox. The firm has challenged each of the evaluators' conclusions and submitted extensive documentation in support of its position. Univox maintains that the work to be done is easily within its competence to perform, contends that its and its principal design subcontractor's qualifications were grossly misrepresented by the evaluators, and asserts that the allegations that prior contract performance was unsatisfactory are false.

B. Preliminary Issues:

Before discussing the technical aspects of Univox's protest, we consider two requests by the Army that this case be dismissed.

First, the Army contends that a timely protest was not filed because Univox's initial letter of protest merely stated that Univox protested the rejection of its proposal. According to the Army, Univox did not state or

fully support to the extent feasible its grounds for protest until after receiving the Army's initial report to our Office in response to the protest. By that time, the Army says, the protest was late.

As the Army points out, section 21.1(c) of our Bid Protest Procedures (4 C.F.R. part 21 (1983)) requires that the initial protest contain a statement of the grounds of protest. In a later sentence, section 21.1 states that the grounds of a protest filed with the General Accounting Office must be supported to the extent feasible. Section 21.2(c) does not state, however, that detailed support (as distinguished from a general statement of the basis for protest) must be included in the initial protest. Rather, with respect to the initial statement of the grounds for protest, section 21.1(c) cross-references section 21.1(d) which recognizes that an additional or supplemental statement in support of an initial protest may be required.

We view Univox's initial protest as sufficient because, even though its grounds of protest were not explained, they were clearly implied. Univox had received the contracting officer's rejection letter and shortly thereafter protested its rejection from the competitive range. We think it is fair to say that Univox was taking exception to each of the grounds stated for the rejection, and that this was or should have been apparent to the Army. That Univox did not describe in detail until later why it thought the rejection was improper is of no consequence since, generally, whenever a proposal is rejected and the rejection is challenged, the procuring agency is expected to establish the reasonableness of its action.

Alternatively, the Army says that Univox's protest should be dismissed because Univox did not file a response to the Army's report within the time provided in section 21.3(d) of our Bid Protest Procedures (4 C.F.R. § 21.3(d) as amended at 48 Fed. Reg. 1932, January 17, 1983). That provision states:

> "Comments on the agency report, or a statement that the protester does not intend to file comments but desires a decision on the basis of the existing record shall be filed with the Office of General Counsel within

> 10 days after receipt of the report . . . . The failure of a protester to either file comments or otherwise indicate within the 10-day period any interest in receiving a decision shall result in dismissal of the protest."

Univox filed its comments well after the 10-day period elapsed. However, within the period the protester had expressed interest within the meaning of section 21.3(b) by requesting from our Office an extension of time within which to file its comments. The extension was allowed. Therefore, there is no basis for dismissing the protest.

C. Principal Issues:

We initially point out that the issues before us have been substantially altered by the course of the protest. The Army admits that it has been wrong on certain of the perceived deficiencies, and that others had little effect on its decision to reject Univox's offer. According to the Army, the primary deficiency in the Univox offer is that the units are underdesigned and would be incapable of producing 2,000 gph of product water when operating with sea water. The Army bases this conclusion on the results of computer projections which it says it has confirmed by hand calculation and by conducting a line-by-line examination of the computer software used.

On the other hand, Univox maintains that its system will produce in excess of 2,000 gallons of product water per hour as proposed when operating with sea water. It contends that redesign is not necessary. It says that the Army's conclusions were reached because the Army disregarded the design data which Univox's proposal showed that the firm had used and, without conducting discussions, relied on other data which has no relevance to the proposed design.

As to the impact of the disputed data, the amount of feed water which Univox calculated to be needed (and thus the size of the feed water pumps and plumbing) must equal the amount of water to be delivered (2,000 gallons of sea water per hour) plus the amount of water discharged as a

waste by-product of the reverse osmosis process. The proportion of feed water that is transmitted through the RO elements (and thus not wasted) and the pressure (and power) required to achieve a given flow depend upon the operating characteristics of the RO elements selected. Use of data which does not correctly reflect the operating characteristics of the RO elements will result in an erroneous calculation of most system parameters, including feed water requirements and engine capacity. The record discloses that the characteristics Univox's proposal shows the firm assumed and those which the Army used differ by a factor of two.

In our view, resolution of the protest depends on whether the Army could reasonably rely on data it generated itself, without regard to the data Univox furnished with its offer, to reject the proposal without discussion. As a general matter, we see nothing improper where a contracting activity in evaluating proposals considers evidence obtained from sources outside the proposal. In appropriate cases, we have stated that a contracting officer should consider extrinsic evidence when evaluating proposals. New Hampshire-Vermont Health Service, 57 Comp. Gen. 347 (1978), 78-1 CPD 202. The use of extrinsic evidence, however, must be consistent with established procurement practice. One of the fundamental features of a negotiated procurement is that a firm whose proposal appears to have correctable weaknesses is given the opportunity, through the process of negotiations, to explain or attempt to correct them. See ABC Management Services, Inc., 53 Comp. Gen. 584 (1974), 74-1 CPD 67.

We cannot conclude that the Army's sole reliance on its extrinsic data to reject Univox's offer without inquiry was reasonable. According to the Army, the design of reverse osmosis water purification equipment is a complex matter, and we note that Univox's proposal was supported by detailed calculations. Nevertheless, it appears from the record that the Army rejected Univox's offer without considering Univox's data. We simply do not see how, in a procurement like this one, an agency can disregard data an offeror furnished with its proposal without at least evaluating the data and, if necessary, finding out why the data

is different from the agency's. See Decision Sciences Corporation, B-183773, September 21, 1976, 76-2 CPD 260 (stating that it would be improper for a contracting agency to rely on experience data obtained by contacting references unless the agency verified the validity of the data obtained).

Moreover, the Army has not explained its own calculations.[3] It states that one of the operating characteristics of the RO element was obtained during a telephone conversation with the president of Univox's RO element manufacturer and that its conclusions are supported by Army testing, and it attacks the credibility of Univox's evidence.

We have been furnished no documentation in support of the Army's contentions, while Univox, on the other hand, has fully documented its position. Among other evidence, Univox has submitted a test report prepared by an acknowledged expert in the field. It has furnished a telegram from the president of its RO element manufacturer setting out what that firm believes the RO element characteristics are. It has shown how both sources agree with its data, rather than with the Army's data.

Further, we find no merit to the Army's attack on the credibility of Univox's evidence.

For example, the Army asserts that, although Univox has claimed that the test report just referred to was based on 100 hours of test data, the data attached to the report shows that only 20 hours of testing was done. The Army is

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[3]In this regard, the Army's contention that it has carefully reexamined its computer model and verified the calculation by hand is irrelevant since the validity of the data used, and not the model, is disputed. The Army and Univox are using comparable models; indeed, the computer model used by the Army was developed by the same person who developed the model upon which Univox bases its results. At the bid protest conference in this case that individual stated that although there were differences between the models used, the differences were slight and would not account for the disparity between the Army's calculations and those Univox obtained.

mistaken, however. Examination of the report discloses that the attachment to which the Army refers is only intended to illustrate testing at one of the five pressures at which tests were conducted. The results of tests at all five pressures are presented in the report.

We also note the Army's contention that the data Univox has submitted is inconsistent; according to the Army, Univox has repeatedly altered its position during the protest in a continuing effort to correct a fundamentally defective proposal. Examination of the record discloses, however, that the Army's concerns are groundless. Univox appropriately framed its proposal using numbers that are more conservative than the empirical data on which it relies. While it is true that the various test results reported by Univox show some variation, this is to be expected. What is significant is not that there is some variation in the data which Univox has presented but that all of its data differs markedly from the values which the Army assumed.

D. Other Issues:

Having disposed of the issue which the Army cites as the primary deficiency in Univox's proposal, we deal briefly with the other matters that have been argued. On several points--for example, the conclusion that standard military generator sets could not be used--the Army concedes it was simply wrong. In our view, the other issues--Univox's choice of a chlorinator and the evaluators' criticism of the Univox design with respect to noise, temperature, operability and maintainability--have been sufficiently answered by Univox to demonstrate that discussions would have been fruitful. Further, the Army has not defended the evaluators' criticism of past Univox performance. Counsel for the Army has indicated that Univox is held in high regard, that the Army has been satisfied with its past performance, and that the Army expects to contract in the future with Univox.

We have held that a proposal must be considered to be in the competitive range so as to require discussions unless it is so technically inferior or out of line in price as to preclude meaningful discussions. PRC Computer

Center, Inc., 55 Comp. Gen. 60 (1975), 75-2 CPD 35. Although the Army in rejecting Univox's proposal believed it was incapable of being made acceptable through discussions, it is clear that the Army's review of the proposal was indequate. We cannot say, therefore, that its determination had a reasonable basis.

The protest is sustained. We understand that no award has been made. In the circumstances, Univox's proposal should be reinstated and discussions should be conducted with that firm before any final decision regarding the acceptability of its proposal is made.

for Milton J. Socolar
Comptroller General
of the United States